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CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924

MISSOURI PACIFIC RAILROAD COMPANY, Petitioner vs. REYNOLDS-DAVIS GROCERY COMPANY, Respondent.	No. 329.

On Writ of Certiorari to
The Supreme Court of the State of Arkansas

BREIF FOR PETITIONER

STATEMENT

This writ was granted to the Supreme Court of Arkansas to bring up the record in a case where final judgment was entered against the petitioner in favor of the respondent on an interstate shipment of sugar from Raceland, Louisiana, to Fort Smith, Arkansas. The petition for writ of certiorari is as follows:

"TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The Missouri Pacific Railroad Company, in support of this application for writ of certiorari to the Supreme Court of the State of Arkansas shows:

On the 11th day of May, 1921, the Reynolds-Davis Grocery Company, a wholesale grocery company in Fort Smith, Arkansas, filed suit in the Circuit Court of Sebastian County, Arkansas, against the Missouri Pacific Railroad Company for the loss of sixty sacks of sugar, weighing 100 pounds each, shipped from Raceland, Louisiana, to the Reynolds-Davis Crocery Company at Fort Smith, Arkansas. In October, 1922, there was a trial before a jury in the Circuit Court of Sebastian County, resulting in a verdict and judgment in favor of Reynolds-Davis Grocery Company against the Missouri Pacific Railroad Company for $992.22, the value of the sixty sacks of sugar.

At the trial it developed that a carload of sugar was shipped in April, 1920, by B. C. Perkins & Company of Raceland, Louisiana, to the Reynolds-Davis Grocery Company in Fort Smith, Arkansas, in car C. C. & O. No. 8109, under seals No. R-660771 and No. 660772. The shippers loaded

the sugar and filled in the bill of lading. The bill of lading was accepted by the railroad company as 'Shippers load and count,' and the shippers applied the seals to the car. The initial carrier was Morgans Louisiana & Texas Railroad and Steamship Company in Louisiana. The shipment was transported by this line to Texarkana, Arkansas, and by it delivered to the Missouri Pacific Railroad Company. The Missouri Pacific Railroad Company transported the sugar to within the city limits of the City of Fort Smith, Arkansas, and there delivered it to the St. Louis-San Francisco Railway Company. The original bill of lading was not introduced in evidence, but the receipt, or memorandum, was introduced. This memorandum recited that it was an acknowledgment that a bill of lading had been issued, and recited as follows:

'Received, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the original bill of lading, at Mathews, Louisiana, April 7, 1920, from B. C. Perkins & Co., the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked consigned and destined as indicated below, which

said company agrees to carry to its usual place of delivery, at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination.'

The petitioner's physical line of railroad, so far as this shipment is concerned, extended from Texarkana to within the city limits of Fort Smith. The bill of lading was a shipper's order bill of lading, and the Reynolds-Davis Grocery Company purchased it and demanded that the car be placed at the door of its warehouse in Fort Smith. The petitioner, Missouri Pacific Railroad Company, did not have tracks to respondent's warehouse, and the respondent desired that the car of sugar be placed at its warehouse. For this service of moving the car from the line of the petitioner, within the city limits of Fort Smith, over the track of the St. Louis-San Francisco Railway Company to respondent's warehouse, a rate had been approved by the Interstate Commerce Commission, and tariffs were on file showing that rate. The charge for this service was $6.30. The car was transported from Raceland, Louisiana, which was a non-agency station (the bill of lading having been issued at Mathews, Louisiana), to within the city limits of Fort Smith by the Morgan line, and the Missouri Pacific Railroad.

At Fort Smith it was delivered to the St. Louis-San Francisco Railway Company, and that railway company received the car from the Missouri Pacific and took entire charge and control of the car, moved it over its own line of railroad with its own locomotive, and placed the car at the warehouse of the Reynolds-Davis Grocery Company. The transfer of control of the car from one carrier to another at Fort Smith was as complete as the transfer at Texarkana, Arkansas, between the Morgan line and the Missouri Pacific Railroad Company. The record discloses that the compensation received by the St. Louis-San Francisco Railway Company from the shipper for transportating this car over its line was fixed in the published tariff on file with the Interstate Commerce Commission, and that the St. Louis-San Francisco Ry. Company and the Missouri Pacific Railroad Company had no authority to arbitrarily fix any rate for this transportation. After the car had been delivered in good condition by the Missouri Pacific Railroad Company to the St. Louis-San Francisco Railway Company, 6000 pounds of sugar were extracted from it.

There is no dispute in the record but that the loss of the sugar, which is the basis of the judgment, occurred while the car was in the exclusive

control of the St. Louis-San Francisco Railway Company.

Under these facts the trial court held that the St. Louis-San Francisco Railway Company was not a carrier, but was a special agent of the Missouri Pacific Railroad Company, and that the St. Louis-San Francisco Railway Company, although it lost the sugar, was not liable. The trial court entered up judgment against the Missouri Pacific Railroad Company for the sum of $992.22 and interest from April 21, 1920, this being the value of the sixty 100 pound sacks of sugar, and interest thereon from the date they were lost.

An appeal was taken to the Supreme Court of Arkansas, where the judgment of the lower court was affirmed.

There can be no controversy about the facts in the case. The Supreme Court of Arkansas, in its opinion, said:

> 'The car arrived at Fort Smith on April 19th, and on that day it was delivered by appellant (petitioner, Missouri Pacific Railroad Company), to the Frisco Railroad in good order with the seals unbroken. The appellant took a receipt from the Frisco Railroad showing that the car was in good order when delivered to

the latter company. When the car was delivered by the latter company to appellee's (respondent, Reynolds-Davis Grocery Company) warehouse, the original seals had been broken and replaced by Frisco seals.'

From this it can be seen that there is no controversy as to the fact that the sugar was lost while the car was in the care and custody of the St. Louis, San Francisco Railway Company. The Supreme Court of Arkansas then said:

'The Frisco Railroad, as already stated, is not named in the bill of lading as a connecting or delivering carrier; but, on the contrary, appellant is expressly named as the delivering carrier; its line reaches to the City of Fort Smith and it expressly undertakes to deliver this sugar in good order at its destination. It is bound by the terms of its contract.'

The Court further said:

'The appellant (petitioner) paid the Frisco the sum of $6.30, their switching fee for the service in switching the car to the warehouse of appellee, (respondent). This switching fee charge was covered by tariff on file with Interstate Commerce Commission.'

The Supreme Court of Arkansas correctly

states these facts. The car was safely transported from Raceland, Louisiana, to the city limits of Fort Smith, Arkansas, by the Morgan line and the Missouri Pacific Railroad Company. There, the exclusive control of the sugar was relinquished to the St. Louis-San Francisco Railway, for which service the St. Louis-San Francisco Railway Company was paid according to the published tariffs on file with the Interstate Commerce Commission. The Frisco lost the sugar. The Supreme Court of Arkansas then held that if the appellee had sued that railroad company for the loss of this sugar, it would not have been liable, but held that liability existed only against the Missouri Pacific Railroad Company for the loss of the sugar, although the Court stated in its opinion that the St. Louis-San Francisco Railway company was the company that lost the sugar. It is hard to believe that such was the decision, but we further quote as follows from the language of the Supreme Court of Arkansas, in its opinion, to show that we are correct in that statement:

> 'In other words, if the appellee (Reynolds-Davis Grocery Company) had sued the Frisco Railroad for this loss, instead of the appellant (Missouri Pacific Railroad Company) the

Frisco Railroad would not be liable to the appellee, for the simple reason that under the contract of shipment, the bill of lading, the Frisco Railroad had not contracted with the appellee to deliver this carload of sugar to the appellee's warehouse in Fort Smith. This was a service, which under the bill of lading, appellant had contracted with the appellee to perform, and it undertook the performance thereof through its agent, the Frisco Railroad Company.'

The Supreme Court of Arkansas committed error in so holding, because the contract was the contract of the Morgans Louisiana & Texas Railroad and Steamship Company in Louisiana, and the St. Louis-San Francisco Railway Company was as much a carrier under the terms of that contract as the Missouri Pacific Railroad Company. It was not necessary to write into the face of the bill of lading the initials of the delivering carrier. The contract in the bill of lading was to deliver the shipment to destination. By the opinion of the Supreme Court of Arkansas in this case, no delivering carrier other than the initial carrier would be liable unless it was actually named in the bill of lading. In this case the Missouri Pacific Railroad Company carried

the sugar as far as it could toward the point of final delivery, within the city limits of Fort Smith and then under the published tariff on file with the Interstate Commerce Commission, it turned the exclusive control of the sugar over to the St. Louis-San Francisco Railway, which, for the benefit of respondent, transported it to the door of respondent's warehouse. This service was a part of the interstate journey of the sugar. It was provided for in the tariffs on file with the Interstate Commerce Commission, and the rate for the service was approved by the Interstate Commerce Commission.

It was pressed upon both the trial court and the Supreme Court of Arkansas that under the Interstate Commerce Act and the Transportation Act of 1920 the St. Louis-San Francisco Railway Company was a carrier, and that under the rules laid down by the Supreme Court of the United States involving interstate shipments the Missouri Pacific Railroad Company was an intermediate carrier and when the undisputed evidence showed that it had not lost the sugar, there could be no liability against it. These contentions were denied by the Supreme Court of Arkansas.

A petition for rehearing was filed, again stressing the same question, and this was overruled.

Both in the trial court and in the Supreme Court of Arkansas this petitioner contended that under the Acts of Congress regulating commerce and under the tariffs on file with the Interstate Commerce Commission, pursuant to those Acts, the St. Louis-San Francisco Railway Company was the delivering carrier in this case; that it was undisputed that the loss occurred on the line of that railroad company, and that the petitioner, as an intermediate carrier, on whose line the loss did not occur, was not liable.

The petition for rehearing was overruled in the Supreme Court of Arkansas and final judgment was entered on the 21st day of January, 1924.

In compliance with the rules of this Court, your petitioner furnishes and herewith attaches as an exhibit to this petition a duly certified copy of the entire transcript of the record in this cause, including the proceedings of the Court to which this writ is asked to be directed.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this Court directed to the Supreme Court of Arkansas to command said Court to certify and send to this Court on a date certain, to be therein designated, a full and com-

plete transcript of the record and the proceedings of said Supreme Court in said cause therein entitled 'Missouri Pacific Railroad Company vs. Reynolds-Davis Grocery Company,' and numbered in said Supreme Court 7918, to the end that said cause may be reviewed and determined by this Court as provided by the provisions of the Act of Congress known as the Judicial Code, and by the amendments thereto, including that of September 6, 1916, and that this petitioner may have other and further relief in the premises, as to this Court may seem appropriate, and in conformity with said Act of Congress, and that the judgment of said Supreme Court of Arkansas in said cause, and every part thereof, may be reversed by this Honorable Court."

FEDERAL QUESTION PROPERLY PRESENTED

The petitioner properly raised and relied upon the federal question in the courts below by claiming that its responsibility for the loss of the sugar on an interstate shipment from Raceland, Louisiana, to Fort Smith, Arkansas, depended upon the acts of Congress and applicable principles of common law as interpreted and applied by the federal courts. The question was definitely raised in the trial court. Petitioner introduced evidence that the loss occurred

on the line of the delivering carrier, the St. Louis-San Francisco Ry. Company (R. 36). It further developed in the evidence that the petitioner had no track in the City of Fort Smith, by which cars could be delivered to the Reynolds-Davis Grocery Company, respondent. (R. 8). It developed that the switching rate which was paid to the St. Louis-San Francisco Railway Company for the movement of this car was carried in the Interstate Commerce tariff (R. 9). It further developed by the evidence that when this car was delivered to the St. Louis-San Francisco Railway Company within the city limits of Fort Smith, the latter company took charge of it with its own motive power, moved it over its own rails and that petitioner had no further control over it (R. 9). It objected and properly saved its exceptions to Instruction No. 4 given by the trial court, which declared that the St. Louis-San Francisco Railway Company was the agent of the petitioner. (R. 47). It further requested proper instructions under the rules laid down by the decisions of this Court under the act to regulate commerce with reference to the liability of the connecting carriers (R. 48-49). The question was properly presented in the Supreme Court of Arkansas (R. 54-55). The Supreme Court of Arkansas held that it was an interstate commerce shipment and attempted to apply the rules for such shipments laid down by this court, citing the case of

Oregon-Washington Co., vs. McGinn, 258 U. S. 409, and Georgia F. A. Ry. Co., vs. Blish Milling Co., 240 U. S. 190.

Proper petition for rehearing was presented and the question again pressed upon the Supreme Court of Arkansas. It will, therefore, be seen that the Acts of Congress and applicable principles of common law, as interpreted and applied by the Federal courts, were presented both to the trial court and to the Supreme Court as constituting defenses to which the petitioner was entitled to avail itself.

THE SUPREME COURT OF ARKANSAS ERRED IN HOLDING THAT THE ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY WAS NOT THE DELIVERING CARRIER AND IN HOLDING THAT IT WAS AN AGENT OF THE INTERMEDIATE CARRIER, MISSOURI PACIFIC RAILROAD COMPANY.

The necessary facts are undisputed and most of them are recited correctly in the opinion of the Supreme Court of Arkansas. The shipment was an interstate shipment of freight from a point in Louisiana to the Reynolds-Davis Wholesale Grocery Company in Fort Smith, Arkansas. The initial car-

rier was Morgan's Louisiana & Texas Railroad and Steamship Company. The shipment was delivered to the Missouri Pacific Railroad Company at Texarkana, Arkansas-Texas, and by it delivered to the St. Louis-San Francisco Railway Company at Fort Smith, Arkansas, for final delivery to the consignee. It was held by the trial court and the Supreme Court of Arkansas that the St. Louis-San Francisco Railway Company was an agent of the Missouri Pacific Railroad Company. The Supreme Court of Arkansas erroneously stated that the St. Louis-San Francisco Railway Company did not "share in the distribution of the freight charges."

It is true that the entire charge for the transportation of this shipment from Raceland, Louisiana, to Fort Smith was covered by tariffs on file with the Interstate Commerce Commission. A part of this charge was the amount paid the St. Louis-San Francisco Railway Company for transporting the car from the line of the Missouri Pacific Railroad Company to the warehouse of the respondent. The undisputed testimony of P. W. Furry, who was a witness for respondent, is to the effect that this switching rate is fixed by the Interstate Commerce Commission and was carried in Interstate Commerce tariffs (R. 9). Hence, it was properly a part of the "freight charges" and, therefore, the St. Louis-San

Francisco Railway Company shared in the freight charges.

With reference to an interstate shipment, the decisions of this Court interpreting the Interstate Commerce Act are controlling. Certain declarations of law which control this question have been conclusively settled by this Court. They are as follows:

(a) The initial carrier was liable for any loss or damage to the sugar, regardless of where the loss or damage occurred in the course of transportation.

Atlantic Coast Line Ry. Co. v. Riverside Mills, 219 U. S. 186.

(b) Notwithstanding the absolute liability of the initial carrier, under the Interstate Commerce Act, a presumption arises in the absence of proof as to where the loss or damage to the shipment occurred that the delivering carrier was negligent, in a suit against an intermediate or delivering carrier.

Georgia F. A. R. R. Co. v. Blish Milling Co., 241 U. S. 190.

(c) In a suit for loss or damage to freight in transit, there is no presumption against an

intermediate carrier, which is neither the initial nor the delivering carrier, that the loss or damage occurred on its line, and a recovery may be had against an intermediate carrier only upon actual proof that the loss or damage occurred on its line.

Oregon, Washington R. & N. Co. v. McGinn, 258 U. S. 409.

If we apply these principles, the question resolves itself into whether or not the St. Louis-San Francisco Railway Company in this case was to be treated, as a matter of law, as the agent of the Missouri Pacific Railroad Company or as a separate and distinct carrier.

The Interstate Commerce Commission has power to fix the charges for delivering cars on a private track within the town of Fort Smith, Arkansas. This Court, in speaking of the Terminal Railroad Association of St. Louis in the case of Terminal Railroad Association of St. Louis v. United States of America, decided October 13, 1924, U. S. Sup. Ct. Adv. Op., November 1, 1924, said:

"The Terminal Railroad Association and its subsidiaries are common carriers by railroad and, like the proprietary companies, are subject to regulation by the Commission."

In the case of Grand Trunk Railway v. Michigan Railroad Commission, 231 U. S., 457, this Court, in an opinion by Mr. Justice McKenna, held that Congress has not so taken over the whole subject of terminals, team tracks, switching tracks and sidings of interstate railways as to invalidate state regulations relative to the interchange of traffic.

Up until 1920 Congress had not so taken over the whole subject of terminals, team tracks, switching tracks, and sidings in Fort Smith as to prohibit the Missouri Pacific Railroad Company from arranging by private agreement with the St. Louis-San Francisco Railway Company, whereby the latter company would act as an agent of the Missouri Pacific Railroad Company. However, this Court in the case of United States v. Penna R. R. Co., decided November 17, 1924, U. S. Sup. Ct. Adv. Op. December 15, 1924, upheld the power of the Interstate Commerce Commission to treat movements such as is involved in the case at bar as transportation and to regulate them. In that case, Mr. Justice Brandeis said, with reference to the common use of railroad terminal facilities:

> "Under the Interstate Commerce Act, as amended by the Transportation Act (February 28, 1920), chap. 91, 41 Stat. at L. 456, Comp.

Stat. Sec. 10,071¼, Fed. Stat. Anno. Supp. 1920, p. 72, the Commission might, upon proper findings and conditions, have ordered such extension of tracks, under the powers conferred by Sec. 1, Par. 21, p. 478; or it might have ordered an enlargement of the common use of terminals under Sec. 3, Par. 4, p. 479; or it might have equalized rates and charges for plants within and without the zone by exercise of the power, conferred by Sec. 15, Pars. 3 and 4, pp. 485, 486, to establish through routes and joint rates."

The respondent, Reynolds-Davis Grocery Company, desired a delivery of this car to its warehouse door. The Missouri Pacific Railroad Company had no track whereby this might be accomplished. In the absence of an appropriate order of the law-making power, if it were to be regarded as a purely switching service, the car could not have been delivered to the door of respondent's warehouse without the consent of the St. Louis-San Francisco Railway Company and if, by private treaty on the part of the Missouri Pacific Railroad Company with it, the St. Louis-San Francisco Railway Company had agreed to move this shipment for a sum of money agreed upon to be paid by the Missouri Pacific out of its return for carrying the shipment from Texarkana to Fort Smith, it might properly have been

held to be an agent of the Missouri Pacific Railroad Company, as it was declared by the Supreme Court of Arkansas.

We must look at the facts, however, to see whether or not the act performed by the St. Louis-San Francisco Railway Company was an act of transportation of freight as contemplated by the Interstate Commerce Act as amended by the Transportation Act.

We find that there was a fixed tariff on file and approved by the Interstate Commerce Commission for this charge. The Missouri Pacific Railroad Company relinquished all control over the car. It moved over the rails of the St. Louis-San Francisco Railway Company and was moved by a locomotive of the St. Louis-San Francisco Railway Company. The Missouri Pacific Railroad Company took a receipt for the car in good condition and while it was in the possession of the St. Louis-San Francisco Railway Company and while the latter company was earning the proportion of freight charges allowed it by the Interstate Commerce Commission in the tariff, the sugar was extracted and lost. The Supreme Court of Arkansas, in its opinion, said:

"The Frisco Railroad would not be any more liable under this contract than would some

transfer company in the City of Fort Smith, whom the appellant (Missouri Pacific Railroad Company) had employed to deliver the sugar to the appellee's warehouse after the car arrived at Fort Smith, its destination. In other words, if the appellee had sued the Frisco Railroad for its loss instead of the appellant, the Frisco Railroad would not be liable to the appellees for the simple reason that under the contract of shipment, the bill of lading, the Frisco had not contracted with the appellee to deliver this carload of sugar to appellee's warehouse in Fort Smith."

The Missouri Pacific had not directly contracted with the respondent. It is true that the initials of the Missouri Pacific were written into the routing on the memorandum for the bill of lading. As we interpret the opinion of the Supreme Court of Arkansas, its effect is to hold that if a shipment starts from a point in Louisiana to Fort Smith and the name of the last, or delivering, carrier is not inserted in the routing on the bill of lading, then no suit can be instituted against the carrier that actually delivers the freight. In the bill of lading in this case (R. 28-29), the name of the Missouri Pacific does not appear. The following appears in the routing on the memorandum bill of lading:

"Route: M. L. & T. Alex., Mo. P."

This bill of lading shows it is only a memorandum bill of lading "for use in connection with the standard form of printed bill of lading approved by the Interstate Commerce Commission." There is no showing as to the contents of the formal bill of lading and this memorandum carries only the route, yet the Supreme Court of Arkansas, in its opinion, held that because the initials of petitioner appeared in the route on the bill of lading, the St. Louis-San Francisco Railway Company was its agent. From the strict point of the law of agency, it has always been our understanding that even if the St. Louis-San Francisco Railway Company were an agent of the Missouri Pacific and lost the sugar, then such agent would be liable in an action for conversion of the sugar. However, the Supreme Court of Arkansas held that a peculiar arrangement existed between the St. Louis-San Francisco Railway Company and the Missouri Pacific Railroad Company, under which in no event the St. Louis-San Francisco Railway Company would be liable for the loss of this sugar.

In the case of Grand Trunk Railway v. Michigan Railroad Commission, cited above, Justice McKenna said:

> "And it was remarked that the fact that the freight movement begins and ends within

the limits of a city does not take from it its character of an actual transportation between two termini, the other conditions obtaining We concur in the conclusion of the court."

Congress took over this question by the Interstate Commerce Act as amended by the Transportation Act, Sec. 15, Pars. 3 and 4, pp. 485-6, 41 Stat. at L. Pursuant to this act, the Interstate Commerce Commission approved a tariff fixing the rate that the St. Louis-San Francisco Railway Company might charge for moving this car from the Missouri Pacific Railroad under its own control and with its own locomotive and over its own line of railroad to the door of respondent's warehouse. Prior to the time Congress entered this field, the Missouri Pacific Railroad Company might have made a private contract with the St. Louis-San Francisco Railway Company to move this car and the St. Louis-San Francisco Railway Company might have been the agent of the Missouri Pacific under such a contract. The facts to develop such a supposed situation are not in this record. On the contrary, it is the positive proof that pursuant to the authority granted to the Interstate Commerce Commission, it had entered the field and fixed the charge for this service. The respondent had the right to demand that this car be delivered at the door of its ware-

house in payment of the charges fixed by the Interstate Commerce Commission and the Missouri Pacific had no right to stop the car on a team track and require the respondent to unload its car and haul the sugar to its warehouse by teams or trucks. This situation, therefore, constituted the St. Louis-San Francisco Railway Company the delivering carrier.

The Supreme Court of Arkansas relied upon the following cases to sustain its conclusion that the delivering carrier was an agent of the intermediate carrier, the Missouri Pacific Railroad Company: Western Atlantic Ry. Co. v. Exposition Cotton Mills, (Ga.) 2 L.R.A. 102; 7 S.E. 916; Sapiro v. Boston & Maine Ry. Co., 213 Mass. 70; 99 N.E. 459; St. S.W. Ry. Co. v. A. A. Jackson & Co., 118 459; St. L. & S. W. Ry. Co. v A. A. Jackson & Co., 118 Fed., 623.

An examination of these cases discloses that the facts in each particular case justified the Court in finding that the instrumentality, which actually delivered the freight, was in truth an agent acting for a principal. The difference is that in the case at bar, the St. Louis-San Francisco Railway Company was performing a service as a common carrier under a tariff approved by the Interstate Com-

merce Commission, pursuant to authority granted it by an act of Congress.

Respectfully submitted,

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